STATE OF MICHIGAN

COURT OF APPEALS

MARK PACKOWSKI, Plaintiff-Appellant,	FOR PUBLICATION July 8, 2010
v	No. 282419 Kent Circuit Court
UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951, Defendant-Appellee.	LC No. 03-007476-CZ Advance Sheets Version

Before: BECKERING, P.J., and WILDER and DAVIS, JJ.

BECKERING, P.J. (*dissenting*).

Plaintiff claims that his employment was terminated in violation of defendant's just-cause policy. I write separately because I respectfully disagree with the majority's conclusion that plaintiff's wrongful-discharge claim is preempted by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*. I would vacate the trial court's orders granting summary disposition to defendant and denying plaintiff's motion for reconsideration.

The trial court granted defendant summary disposition under MCR 2.116(C)(4), concluding that it lacked subject-matter jurisdiction. As indicated by the majority, this Court reviews de novo a trial court's decision on a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and reviews for an abuse of discretion its decision on a motion for reconsideration, *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Whether a trial court has subject-matter jurisdiction is a question of law, which this Court reviews de novo. *Fisher v Belcher*, 269 Mich App 247, 252-253; 713 NW2d 6 (2005).

"Where the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled in part on other grounds *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). In the absence of express preemption, federal preemption may be implied in the form of conflict or field preemption. *Ryan*, 454 Mich at 28. The majority concludes here that plaintiff's wrongful-discharge claim under state law conflicts with the LMRDA and is, therefore, "conflict-preempted." "Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purposes and objectives of Congress." *Id*.

In *Finnegan v Leu*, 456 US 431, 441; 102 S Ct 1867; 72 L Ed 2d 239 (1982), the United States Supreme Court stated that when the LMRDA was enacted, its "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." The Court further stated that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id*. According to the majority in this case, allowing plaintiff's state claim for wrongful discharge to proceed would conflict with the LMRDA's purpose of ensuring union democracy and elected union officials' authority to select staff members.

In *Ardingo v Local 951, United Food & Commercial Workers Union*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued May 29, 2009 (Docket No. 08-1078), p 7, however, the court concluded that "[t]here is no danger that [the LMRDA's] objective will be interfered with by a lawsuit that seeks to vindicate an employee's rights under a just-cause employment contract." Although this Court is not required to follow decisions of a United States court of appeals, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), and *Ardingo* is unpublished, I find the *Ardingo* court's reasoning persuasive. See *id*. at 607. Like *Ardingo*, this case presents a unique set of facts in that plaintiff is suing to enforce his contractual rights under his just-cause employment contract with defendant. None of the out-of-state cases relied on by the majority involve a just-cause contract provision. As noted by the *Ardingo* court, "when a union chooses to offer a just-cause employment contract to an employee, there is nothing in *Finnegan* or the LMRDA that would prevent that contract from being enforced." *Ardingo*, unpub op at 10. *Finnegan* does not stand for the proposition "that state law could never restrict a union leader's discretion to terminate a union employee." *Id*., citing *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1360-1362 (CA 9, 1986) (holding that a wrongful-discharge claim was not preempted by the LMRDA when a business agent claimed to have been discharged for refusing to violate state law). While the majority is correct that the LMRDA was enacted to ensure that unions are democratically governed and that elected union officials have the ability to select staff members, and, in that way, respond "to the mandate of the union election," *Finnegan*, 456 US at 441, democratically elected union officials may choose to offer an employee a just-cause employment contract, omit a just-cause provision from an employment contract, or tailor such a provision by, for example, defining the term "just cause" in the contract. Thus, enforcing a union's just-cause policy does not conflict with the LMRDA's objective of ensuring union democracy. To hold otherwise would permit unions to offer employment contracts with just-cause provisions that the employees have no ability to enforce, at least in state court, rendering the provisions virtually meaningless.[1]

[1] In footnote 3 of its opinion, the majority states that plaintiff may bring a civil action in federal court under 29 USC 412 if he was discharged in retaliation for participating in a Department of Labor investigation. I note, however, that in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees. See *Finnegan*, 456 US at 436-437.

I would hold that plaintiff's wrongful-discharge claim is not preempted by the LMRDA because his claim does not directly conflict with the act or with any of its purposes or objectives, see *Ryan*, 454 Mich at 28, and would vacate the trial court's orders granting summary disposition to defendant on the basis of preemption and denying plaintiff's motion for reconsideration. [2]

/s/ Jane M. Beckering

[2] Defendant claims on appeal that the just-cause provision of plaintiff's employment contract could only be enforced through arbitration. I will not address this claim, as it is irrelevant to the question of preemption.